No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

L. C. NEWMAN, *Petitioner*,

VERSUS

THE STATE OF TEXAS, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Facts

The facts show that sometime during the day or night of August the 27th, 1944, an elderly white lady was purportedly murdered in the rural section of Polk County, Texas, near the town of Camden, Texas. That the Sheriff's officers were called, and without warrants arrested petitioner in a saw-mill town, Camden, Polk County, Texas, in the late hours of night of August the 27th, 1944. He was arrested with several other negroes who were suspected of murder. That several negroes, including petitioner, were placed in the county jail, Livingston, Polk County, Texas, for investiga-

tion. During the investigation of the alleged murder, the Sheriff of Polk County, Texas, requested assistance from the State Rangers of Texas in his investigation. The petitioner, as well as other negroes, were questioned by both local and State Rangers. The petitioner was carried from the county jail on several different occasions by the local officers and State Rangers to the scene of the alleged crime. Several of these trips occurred during the night hours. The petitioner, after several nights and days of questioning by local and State officers, and without an opportunity to consult an attorney, or anyone to apprise him of his constitutional rights, purportedly made a confession to a special prosecutor in his private law office in Livingston, Texas. This confession is alleged to have been made after the petitioner had been severely whipped by the officers who had him in charge.

The first purported confession was made, and the testimony shows that the officers who had him in charge, were not satisfied with the first confession. They carried him back to the scene of the alleged crime, and later carried him to the office of the special prosecutor, and a second statement was purportedly made, in that the special prosecutor had the petitioner and another negro held for investigation in his office, and while surrounded by local officers and State Rangers, asked the petitioner questions, and then dictated to his private secretary the purported statement, which was used in evidence against this petitioner upon his trial charged with the offense of murder.

The first purported confession was at no time introduced in evidence, but instead, was declared to be untrue by the captain of the State Rangers, who was assisting in the investigation, and who swore in trial of the case that the reason the second statement was desired, was that the first statement allegedly made by the petitioner was not true.

During the month of September, 1944, a special term of

the District Court convened, and the grand jury impaneled, an indictment was returned by this grand jury indicting this petitioner for murder. On September the 26th, 1944, the case was called for trial. The petitioner was too poor to employ counsel of his own choosing. And the court having appointed V. A. Collins and Ernest Coker, attorneys of the Polk County Bar, to represent the petitioner. That a jury commission had been drawn to select a venire of two hundred men, from which to select a jury of twelve men to try the petitioner.

A motion was made to quash the venire, because in selecting the venire the jury commission had used a property tax roll of Polk County, Texas, from which to select said venire. In that the use of the property tax roll discriminated against the petitioner, the negro. And that a small percentage of the negro population of the county was denied the right of jury service by such procedure in that many of them do not pay property tax. And such procedure further discriminated against qualified jurors, who were not property taxpayers in the county.

The conduct of the jury commission violated Section 19, Article 16, of the CONSTITUTION OF TEXAS, in that the Legislature of the State has set out the qualifications of a juror, qualified to serve in such character of cases, which qualifications are as follows:

> Good moral character; sound judgment; well informed; and so far as practicable, able to read and write. Article 2110, of the TEXAS REVISED STATUTES.

This violation not only discriminated against the petitioner, who is a negro, as a race, but it also discriminated against him as a class, in that the Legislature of the State of Texas has not made the prerequisite of a juror to be that of a property taxpayer.

We here submit our motion to the Court of Criminal Appeals of Texas as our brief, in support of this application for Writ of Certiorari, which presents the two points set out in our writ, as follows:

(A.) Point Number One is in violation of the Federal Constitution and the State Constitution, in that the petitioner was not tried by a legally drawn and legally constituted jury.

(B.) That he was forced to give evidence against himself in violation of the Fourteenth Amendment of the FEDERAL CONSTITUTION of the Due Process clause, in that the purported statement used against him upon his trial for the offense of murder was an involuntary statement.

This Honorable Court erred in failing and refusing to sustain petitioner's second assignment of error in his motion for a new trial, reading as follows:

> "The undisputed evidence showing that the negro population in Polk County is about one-third of the entire population of the County, and that there are approximately 1000 negroes in Polk County qualified under the law, for jury service, and that fewer than 15 negroes, the number of peremptory challenges which may be exercised by the State, were on the venire of 200 men, shows a rank discrimination against petitioner and that there was a studied effort on the part of the jury commissioners to keep qualified jurors of his race off the jury, and shows discrimination against his race, and the court erred in overruling the motion to quash the special venire summoned in this case;"

Your petitioner's motion to quash the venire should have been sustained in quashing the venire because of class prejudice.

The Court erred in failing and refusing to sustain petitioner's third assignment of error in his motion for a new trial, reading as follows:

> "The undisputed evidence in this case showing that the jury commission which drew the venire in this case, used the property tax rolls from which they selected names to place upon said venire, and that negro property taxpayers are not exceeding 10 per cent of the white property taxpayers, although a nonproperty taxpayer is a qualified juror, and by such method of drawing the venire, could not have drawn more than five or six negro veniremen out of each one hundred jurors, shows unreasonable discrimination against the negro race, and against defendant who is a negro, and the Court erred in overruling the motion to quash the venire in this;"
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> "The undisputed evidence showing that the Sheriff requested Rangers to be sent into the County when it became known that a murder had been committed, and that two came from Houston, and one came from Huntsville, and that the three remained in the county for three days, that is from Sunday until Wednesday night, when a confession was signed by the defendant, and that during all said time, the defendant was constantly, both day and night, with the Sheriff and one or two of his deputies and D. W. Hicks, a State Highway patrol and stationed at Livingston, and the three Rangers, one or all of them, and that they were accompanying him back and forth from where the crime was committed, to the jail, and that when petitioner was not on these trips with the officers, some of them were in the jail questioning him, and that, at least twice, they had him in the office of Z. L. Foreman, the private prosecutor in the case, and that the petitioner was a very ignorant and illiterate negro, and that none of the time he had access to counsel or advice from any attorney or anyone else capable of advising him about his

legal rights, and that after three days of such maneuvering and questioning he was taken to the office of said Foreman, near the midnight hour, and there in the presence of the Sheriff and one or more deputies, and two or more Rangers, all armed, a confession of eleven typewritten pages was prepared by said Foreman, by asking petitioner certain questions and then putting them into the language of said Foreman, and after same was typewritten by secretary, who read it to defendant, who was shown to be a very ignorant negro, who had only been through the third grade in a country school, such confession made under such environment and circumstances was, as a matter of law, an involuntary confession, and the Court erred in allowing same to be introduced, in evidence over defendant's objection."

POINTS UNDER FIRST AND SECOND ASSIGNMENTS GROUPED AND CONSIDERED TOGETHER

"Where a special venire is challenged by petitioner, by motion to quash on the ground of racial discrimination, he being a negro, and the undisputed evidence of the jury commissioners who drew the venire shows that approximately one-third of the entire population of Polk County were negroes and that there were approximately 1000 negroes in Polk County qualified for jury service, and the undisputed evidence further shows only a very small percentage of the negroes are property tax payers, yet the jury commissioners used the property tax rolls exclusively from which to draw the venire, and by that process of drawing a venire could not have drawn one negro as often as they drew ten whites, and that it had the effect of eliminating all white jurors who were not property tax payers, shows rank race discrimination and also class discrimination

in that very few negroes could have been drawn in that way and no whites who were not on the property tax rolls, although the law does not require the payment of property tax to qualify one for jury service, and the court erred in failing and refusing to sustain appellant's motion to quash the venire."

Statement

The Court will observe the difficulty appellant had in developing the evidence on his motion to quash the venire.

The officers were unsympathetic with the motion, and of course, the jury commissioners were loathe to tell.

H. Z. Parrish, one of the jury commissioners, testified that the negro population was about one-third of the population of Polk County.

Evidence on voir dire on the motion to quash p. 4.

Same witness estimated that there were about a thousand negroes in Polk County qualified for jury service.

Evidence on voir dire on the motion to quash p. 5.

On same page same witness testified that there is a great number of colored men in Polk County.

Said he did not know how many negroes they drew on the jury. List did not distinguish the color.

Same witness testified that they must have drawn fifteen or eighteen negroes on this jury.

Statement on voir dire p. 4.

L. M. Phillips, another one of the jury commissioners who drew this venire testified that they used the property tax roll to procure names for the venire. S. S. on voir dire p. 16.

Same witness testified that in drawing this venire they used the property tax exclusively. Statement p. 18.

It was proven (although it is the law) that property tax payers are required to pay poll tax also.

Mr. Foreman, private prosecutor, introduced the poll tax list of Precinct No. 1 (Livingston), and had the witness count voters listed, and when he counted 72 white votes, there were two negroes; referring to Precinct No. 11 (Barnes), there were 31 poll taxes, and only two negroes; referring to Precinct No. 12 (Carmona), there were 50 poll taxes, and no negroes; referring to Holly Grove, it was agreed that there were about 70 poll taxes, and no negroes, and so on through Goodrich precinct, and Onalaska precinct, and it was agreed that the rest of the county would run in about that proportion. There were counted before the Court 964 poll taxes, and, only 13 were negroes, S.F. p. 23.

Authorities

"The Constitution of the State of Texas, Section 19, Article 16, gives the Legislature the power to fix the qualification of jurors.

The Legislature has fixed the qualifications as follows:

Good moral character, sound judgment, well informed, and so far as practicable, able to read and write, REVISED STATUTES, Article 2110.

It has been held that the failure to pay poll tax did not disqualify for jury service, but was ground for challenge, POOL v. STATE, 76 S.W. 567.

(This, even, is not tenable, since the Constitution leaves it to the Legislature, and the Legislature has never attempted to require the payment of a poll tax for jury service.)

Remarks

We are certainly surprised at the way in which the Court attempted to dispose of appellant's assignment based upon the overruling of his motion to quash the venire.

The Court says, "We do not know from this record who

composed the jury that returned the verdict in this case—whether they were chosen from the special venire under attack or otherwise."

We are sorry that this Honorable Court does not know that appellant was tried before this special venire, or talesmen picked up by the sheriff after this venire was exhausted. The law prescribes how a capital case must be tried. There must always be a special venire, and appellant must be served with a list of such venire. That venire must be exhausted before resort can be had to talesmen. We wonder if the Court does not know that appellant was tried before this venire (the very one referred to in the motion to quash) or talesmen summoned by the sheriff after the venire was exhausted. He could not have been tried in any other way. This Court knows that.

The State must first tender defendant a fair and impartial venire—a venire free from anything that might make it partial or biased.

If appellant was tried before any other body than the special venire against which the motion to quash was lodged, it was only because a jury was not procured out of the venire.

Before anything else was done to procure a jury, the venire panel had to be exhausted.

If appellant was not tendered a fair and impartial venire, nothing that followed could have cured the defect and error of presenting an illegal venire.

Was this a legal venire? Out of approximately 1000 negroes qualified for jury service in Polk County, with possibly only twice so many white (since the negro population was about one-third of the entire population) only 15 or 18 negroes were drawn on a venire of 200 men.

There might have been no intentional discrimination on the part of the jury commissioners, but it was impossible that

it should have been otherwise when the commissioners drew the entire venire from the property tax payers list.

It was shown by the poll tax list, that seventy-two whites paid poll taxes in Precinct No. 1, of Polk County, to two negroes, and in other precincts the disparity was even greater. But it may be argued that the poll tax list did not prove that negroes were not property taxpayers. It does so prove.

If they had paid property tax, a poll tax would have been added, where the property taxpayer was subject to a poll. Suppose it might be estimated that a few negroes who were not on the poll tax list actually paid a property tax, the proportion would not have been greater than whites who did not pay poll tax, yet who actually paid property tax. That the proportion of the white property taxpayers in Precinct No. 1, as 72 to 2 of the negro property taxpayers, and in other precincts the proportion runs higher in favor of the white.

In the entire count of the poll taxes made before the court, it showed 13 negroes to 951 whites. This fairly represents the proportion of white and negro property tax payers. Then how could the jury commissioners have drawn more than 15 or 18 negroes of this venire of 200 men when all names on the venire were taxen from list of property taxpayers?

Whether intentional or not, it proves rank racial discrimination.

But it did not stop with race discrimination, it shows palpable class discrimination.

It left off the venire every white man who had no property tax.

It might be conceded that there were both whites and negroes who owned property, *but* were not on the property tax list, because they had not paid taxes. Well they did not appear on the property tax list "exclusively," yet negroes and whites who possessed the other qualifications were qualified

to be on this venire, though they had no property and paid no property tax.

Appellant was not tendered a legal venire because the method of selecting same made it impossible to place thereon more than 15 or 18 (we think less than that) of his own race and none of the white race who had not paid property tax.

He had a right to have his venire drawn from the entire body or group of citizens and not from the limited group of property taxpayers. And the Court committed error in refusing appellant's motion to quash the venire.

PROPOSITION

"Appellant respectfully submits second assignment as a proposition and prays that same be considered here as such."

Statement Under This Proposition

Appellant, L. C. Newman was arrested by Sheriff Kimball at Camden about four o'clock, a.m., 28th of August, 1944, S.F. p. 26.

The sheriff said he gave Newman the warning that he did not have to make a statement, etc.—the statutory warning —S.F. p. 27.

The confession was witnessed by J. M. Hooks and Ollie Morrison, S.F. p. 27.

Capt. Purvis had talked to the defendant, between the day of his arrest and the 30th day of August.

Sheriff Kimball said that if Captain Purvis or any of the rangers or deputies had the defendant out of jail up to the time he talked to him, he did not know it. Said Capt. Purvis talked to him between midnight and Tuesday morning (that was after the arrest on Monday morning), S.F. p. 39. Said he carried defendant to the scene of the crime. Defendant

said he would show them where the piece of iron was, and we drove out in the pasture and stopped the car in front of the house. That was around three o'clock. He said he had been up there two days, Monday and Tuesday. Defendant went with him on Tuesday.

Z. L. Foreman, Mr. Walker, Deputy Sheriff, Capt. Purvis, and Johnnie Klevenhagen, went with him. S.F. p. 40.

They looked for the piece of iron and defendant was with them and looked, but could not find it.

He next saw defendant at Mr. Foreman's office Wednesday at one o'clock, a.m.

He did not know where defendant was from three-thirty o'clock until midnight. He thought he was with Mr. Foreman, Capt. Purvis and other State Rangers.

He left Mr. Foreman's office at two-thirty o'clock Wednesday morning. Did not see defendant any more 'till Wednesday morning. And then saw him in Mr. Foreman's office, there were several there at that time: Capt. Purvis, Mr. Lowman, Mr. Foreman, Mr. Jim Layton and C. C. Galloway.

This was the time and place the confession was taken. S.F. p. 42.

There were present in Foreman's office when the confession was taken, the rangers (three of them had been mentioned. Purvis, Lowman, Klevenhagen). It was shown in evidence of Mr. Purvis that two statements were made, one on Tuesday night. S.F. p. 63.

Capt. Purvis said he talked to the defendant more than one time in Mr. Foreman's office. Same bunch of officers were present.

Said defendant made two confessions—one Tuesday night and one Wednesday night. Said they went back next night and took a second statement. Said the reason for that was the first statement was not true and correct. S.F. p. 51.

Witness J. M. Hooks who signed as witness to the confes-

sion told how the confession was made. Said private prosecutor Foreman would ask the defendant questions, and would then turn to the stenographer, and put defendant's answers into his own language, and dictate it to the stenographer, in his own language, who would type it. S.F. p. 29.

Defendant testified that on Monday night, Mr. Walker, Mr. Hicks, and Mr. Galloway took him to Camden in a car and whipped him with a rubber hose. He describes the beating they gave him. S.F. p. 138.

Authorities

Since this Honorable Court has said that each case must be controlled by its own facts, we are going to cite the following authorities which are basic.

"Confession is voluntary when it proceeds from spontaneous expression of mind, free from influence of any extraneous disturbing cause." WORDS AND PHRASES, 5th Series, Volume 5, p. 1087; CHAMBERS v. FLORIDA, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716; BROWN v. MISSISSIPPI, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682; WHITE v. TEXAS, 310 U.S. 530, 60 S. Ct. 1032, 84 L. Ed. 1342; LOMAZ v. TEXAS, 142 Tex. Cr. R. 231, 144 S.W. (2d) 555; ID., 313 U.S. 544, 61 S. Ct. 956, 85 L. Ed. 1511; WARD v. TEXAS, 316 U.S. 547, 62 S. Ct. 1139, 86 L. Ed. 1663; LISENBA v. CALIFORNIA, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. 166; HYSLER v. FLORIDA, 315 U.S. 411, 316 U.S. 642, 62 S. Ct. 688, 86 L. Ed. 932; ASHCRAFT v. TENNESSEE, 322 U.S. 143, 64 S. Ct. 921, 88 L. Ed. 1192; MALINSKI v. NEW YORK, 65 S. Ct. 781.

Remarks

Let this case stand upon its facts. We think other cases, who are cited by the Court are compelling authority in sup-

port of the position taken by appellant of this issue, but let it rest upon its facts. The Court tries to eliminate this issue from the case by saying that the ruling of the Court on the objections to the admission of the confession was not properly preserved by exception.

When the confession of appellant was offered in evidence the following objections were made by Mr. Coker for petitioner:

"We object to the offering of this purported statement, first, because it has been shown by the sheriff, L. D. Kimball, that the petitioner had not been given an opportunity to consult anyone outside the officers of this county, the peace officers and rangers, as to his legal and constitutional rights; further, that the statement, as made, was dictated by Special Prosecutor Foreman to a secretary, in the person of Miss Matthews, who is a secretary for special prosecutor, and that at the time the statement was taken down in shorthand, and there is no evidence that it was transcribed back with that degree of accuracy as would, if such statement was true, that it was a true and correct copy of the statement dictated by Mr. Foreman; and that, it was not a voluntary statement, in that the statement that is purported to be read at this time by the District Attorney was dictated by special prosecutor to a secretary, and not by the defendant. We offer further, that the purported statement, if it was made by the defendant, was made in the presence of, and surrounded by peace officers, the sheriff and deputy sheriffs of Polk County, Texas, and State Rangers of Texas, and the Special Prosecutor in the case, with the exception of Mr. Hooks and Mr. Morrison, who were called by the peace officers, and Mr. Morrison, had not testified for these reasons we object to it as not being a voluntary statement.

The Court: I overrule the objection.

Mr. Coker: To which we except (S.F. p).

We prepared no special bill, because there was nothing in the evidence offered or put before the jury that needed any further elucidation.

The State offered a certain portion of the confession.

The above objections were made and overruled to which rulings exceptions were taken.

The record disclosed everything which a special bill would have disclosed.

We submit that appellant's exception to the introduction of the confession was properly reserved.

Now let us examine the record in the light of the definition of voluntary statement to see if the case measured up to the requirements to make it a voluntary confession.

"A confession, to be voluntary, must proceed from spontaneous expressions of mind, free from influence of any extraneous disturbing cause." Can this confession meet this definition?

Here a very illiterate and actually ignorant negro was arrested on Sunday morning about 4 o'clock.

He was brought to jail at the county seat.

The Sheriff called Rangers; one came from Huntsville, Ranger Lowman; two came from Houston, Capt. Purvis and Ranger Klevenhagen. From Monday till Wednesday the Sheriff, his deputies, and the Rangers were constantly with appellant, taking him to the scene of the crime, and back, and talking to him in jail and in the office of Private Prosecutor Foreman.

He saw nobody but the Sheriff, his deputies, and the Rangers. Of course he did not know his rights, and had no means of learning.

On Tuesday night the officers had him in Foreman's office, and took a confession, which his attorneys were not permitted to see. Then on Wednesday, something was discovered which did not comport with the confession made, and it had to be changed to correspond with some actual fact discovered on Wednesday. Was this a spontaneous expression of the mind?

Not in his own language. Whatever he said was transformed into the language of the private prosecutor Foreman,—not his words, and perhaps not his thoughts, but Foreman's words and thoughts.

This continued till eleven pages of legal cap paper was covered, then read back to him who possibly knew the meaning of not more than half the words, and then signed by him. We admit that the jury found against appellant's contention that the confession was extorted from him by whipping and threats, but that all the circumstances connected with the confession show that it was involuntary—a confession on Tuesday night—the discovery of something Wednesday not in accord with the confession—another confession Wednesday, with the Sheriff, his deputies and three Rangers present.

Would this justify the belief that it was a spontaneous expression of the mind? Rather does it compel the belief that he was overawed by his environments in the office of Private Prosecutor Foreman at midnight, surrounded by the Sheriff, his deputies and three Rangers, all of who had been for three days dragging him over the "pits of hell," without letup, or anybody to tell him his rights.

We submit, that the facts and circumstances show beyond doubt that the confession was inadmissible in evidence, and that this case must be reversed and remanded.

Wherefore, premises considered, Petitioner prays that his

Application for Certiorari be granted, and that this cause be reversed and remanded.

V. A. COLLINS
AND

ERNEST COKER,
Attorneys for Appellant,
Livingston, Texas

We could see no better way of advising the Court of the issue arising in the petition for certiorari than by making the motion for rehearing in the Court of Criminal Appeals.

The evidence is therein quoted, and the law applied as attorneys for appellant saw it.

Wherefore, your petitioner prays your Honors to enter a stay order against the State Courts holding all actions against petitioner in abeyance till this Honorable Court can pass upon the merits of this petition and make such disposition thereof as may seem proper and right to this Court, and if found meritorious, that this Honorable Court order retrial of this cause in accordance with the law and, in duty bound will ever pray.

V. A. COLLINS,
ERNEST COKER,
Attorneys for Petitioner

Of Counsel:
CARTER WESLEY

I, V. A. Collins, on my oath do depose and say that I am a practicing attorney of the Livingston Bar; that I have prac

ticed in Texas for more than forty years. That I was appointed by the Court along with Ernest Coker to represent your petitioner.

That I am familiar with the facts of this case, having helped to try it, and having argued it on appeal, and that the facts herein set forth are true and that, on said facts, and the law applicable thereto, it is my opinion that the law supports the petition and that same should be granted.

V. A. COLLINS,
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this the 27 day of June, 1945.

EVELYN COKER,
Notary Public,
Polk County, Texas